81-1397

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

PETITIONER

V.

JOHN RONALD DANIELS,

RESPONDENT

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

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## QUESTION PRESENTED

Does Beck v. Alabama, 447 U.S. 625 (1980), require the reversal of all Alabama pre-Beck capital convictions including those in which there was absolutely no evidentiary basis for a lesser included offense instruction?

## PARTIES

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STATE OF ALABAMA,

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RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

---

# BRIEF FOR PETITIONERS

---

## OPINIONS BELOW

1. The opinion of the Court of Criminal Appeals of Alabama, not as yet reported, appears in Appendix A.

2. The opinion of the Supreme Court of Alabama, not as yet reported, appears in Appendix B.

## JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1257. The order of the Supreme Court of Alabama denying certiorari was issued December 11, 1981, and this petition is filed within sixty (60) days of said date.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which provides:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

## STATUTORY PROVISIONS INVOLVED

1975 Alabama Acts, No. 213, codified as Code of Alabama 1975, Title 13, §§ 13-11-1 through 13-11-9, the same being voluminous is reproduced in Appendix C.

## STATEMENT OF THE CASE

### THE FACTS CONCERNING THE CRIME

Between 5:00 and 6:30 p.m. on January 2, 1977, near the Theodore-Dawes Exit on Interstate 10 in Mobile County, nineteen-year-old Ricky Brune and fifteen-year-old Cheryl Moore were found dead. (R. pp. 286-287) Their deaths resulted from multiple gunshot wounds in the back from a .38 caliber pistol and a sixteen-gauge shotgun. (R. pp. 382-389) The time of death was fixed at between 4:15 and 6:15. (R. p. 380) The fatal shots were fired from inside the car from the rear seat. (R. p. 398) At around 5:00 p.m., an unoccupied Ford had been spotted parked at the exit with the motor running. (R. pp. 289-291)

Daniels and his partner, Philip Wayne Tomlin, had arrived in Mobile from Houston, Texas, at Randy and Danny Shanks' trailer the night before be-

tween 11:30 and 12:00 p.m. The Shanks were Tomlin's brothers-in-law. Tomlin introduced Daniels and told the Shanks "they had to come to Mobile to kill the guy that killed his brother." (R. pp. 418-422, 504) Tomlin's brother had been killed on November 25, 1975, as a result of an accidental shotgun discharge which involved Ricky Brune. (R. pp. 294-296)

Randy Shanks rented a room at the Eight Days Inn for Daniels and Tomlin. (R. p. 422) Daniels and Tomlin showed the Shanks a .38 caliber pistol and .44 caliber pistol and a disassembled gun. (R. p. 423) Tomlin asked Danny Shanks if he would take them to New Orleans the next day in his car. (R. pp. 442, 504) Shanks told him no. (R. pp. 443, 504) Tomlin was driving his sister's 1968 Ford. (R. pp. 440, 513) Daniels and Tomlin had flown from Houston to

New Orleans and Tomlin's father picked them up there and brought them to Mobile.

Tomlin's sister's 1968 Ford was found abandoned at the New Orleans International Airport on January 30, 1977. (R. p. 601) Inside the automobile was found a parking lot ticket from an automatic dispenser at the airport parking lot. According to the ticket the automobile had entered the parking lot on January 2, 1977 at 8:08 p.m. The driving time from Mobile to the New Orleans International Airport is two and a half hours. (R. p. 600)

Eastern Airlines flight 569 from New Orleans to Houston departed at 9:40 p.m. on January 2, 1977. (R. p. 343) At the time of his arrest in Houston, Texas, Daniels had a suitcase attached to which was a baggage check which indicated that the suitcase had been

checked on Eastern Airlines' Flight 569, New Orleans to Houston. Inside the suitcase were three 16 gauge shotgun shells. (R. pp. 574-575)

Melvin Tuberville knew Daniels from cell 308 in the county jail. He testified about a conversation with Daniels about his case, wherein Daniels said that "him and Tomlin had killed this boy and girl out on the interstate...at Theodore Dawes Road." (R. p. 305)

The defense was alibi. Daniels denied that he was in Mobile, Alabama, on January 1-2, 1977. (R. pp. 685-687)

## THE STATE TRIAL AND APPELLATE COURT PROCEEDINGS

The Respondent, John Ronald Daniels, was indicted by the Grand Jury of Mobile County, Alabama, for capital murder in April of 1978. His

plea was one of not guilty. (R. pp. 1-3) The Respondent was convicted and sentenced to death. (R. p. 39 and pp. 70-73)

Appeal was taken to the Alabama Court of Criminal Appeals wherein the Respondent raised the issue of the preclusion clause. The issue of the preclusion of consideration of lesser included offenses had also been raised in the trial court by way of a Motion to Quash Due To Unconstitutionality of Act Number 213. (R. pp. 4-8) On August 4, 1981, the Alabama Court of Criminal Appeals issued the following order:

> "The judgment of the conviction is reversed and the cause remanded for a new trial on authority of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), on remand, Ala., 396 So. 2d 645 (1981), and Ritter v. State, Ala.S.C. No. 77-798 (Ms. May 8, 1981), Ala.Cr. App., 1 Div. 837 (Ms. June

> 23, 1981), July 7, 1981, Motion for State of Mandate Denied by Ala.S.C.
>
> REVERSED AND REMANDED."

(Daniels v. State, Ala. Cr. App., ___ So. 2d ___ (1981) [Appendix A])

The State of Alabama presented the question raised herein to the Supreme Court of Alabama by a petition for writ of certiorari which on December 11, 1981, issued the following order:

> "Petition for Writ of Certiorari denied. No opinion." (Daniels v. State, Ala., ___ So. 2d ___ (1981) [Appendix B])

## SUMMARY OF ARGUMENT

Beck v. Alabama, 447 U.S. 625 (1980), held that it was unconstitutional to prevent a capital jury from considering a lesser included offense verdict which is supported by the evidence at trial. In Beck there was evi-

dence to support lesser offense instructions which would have been given had it not been for the preclusion clause. In the instant case, however, there was no evidentiary basis for lesser offense instructions. The jury would not have received any lesser offense instruction even if the preclusion clause had not existed.

The Court of Criminal Appeals and the Supreme Court of Alabama have held in this case and others that all pre-Beck cases must be retried regardless of the impact of the preclusion clause struck down in Beck. See Ritter v. State, Ala., 403 So. 2d 154 (1981) and (Ala., ___ So. 2d ___ (Dec. 11, 1981) and Bracewell v. State, Ala., ___ So. 2d ___ (June 19, 1981) (unreported) and Ala., 401 So. 2d 130 (1981). The interpretation of the Beck decision by the Alabama appellate courts is incorrect in that this Honorable Court's de-

cision in Beck does not mandate retrial in every case without regard to the evidence. On June 22, 1981, this Honorable Court granted certiorari in Hooper v. Evans, 80-1714, to decide whether the Beck decision requires reversals of all pre-Beck capital convictions including those for which there was no evidentiary basis for lesser offense instructions. Britton v. Evans, 49 LW 3954.

Remanding this case for a new trial creates the risk of an arbitrary and capricious verdict such as was condemned in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 [1972] and Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S.Ct. 3001 (1976). This risk is unnecessary because there is a procedure, remandment, by which Respondent's rights can be fully protected without unconstitutional risk. Pate v. State, Ala., ____ So. 2d ___ May 8, 1981).

## ARGUMENT

### I.

THE DECISION IN BECK V. ALABAMA 447 U.S. 625 (1980), DOES NOT MANDATE THE AUTOMATIC REVERSAL OF ALL PRE-BECK CAPITAL CONVICTIONS. (REASON FOR GRANTING THE WRIT - CONFLICT WITH BECK V. ALABAMA, 447 U.S. 625 [1980])

In Beck v. Alabama, 447 U.S. 625, (1980), this Court held that it was unconstitutional to impose a sentence of death on a defendant when the evidence at his trial would have supported a lesser included non-capital offense verdict which the jury was not permitted to consider. In the Beck case, there was evidence to support a lesser offense instruction and the jury which convicted Beck would have received such an instruction if the statutory preclusion clause had not operated to prevent it. This Court carefully limited its grant of certiorari as is clear from the language in the first paragraph of

the opinion wherein this Honorable Court expressed the limitation as follows:

> "We granted certiorari to decide the following question:
>
> "'May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?' 444 U.S. 897
>
> "We now hold that the death penalty may not be imposed under these circumstances."
>
> 447 U.S. at 627

The Beck rule has been applied in Ritter v. State, Ala., 403 So. 2d 154 (1981), a case in which there is no evidence of lesser included offenses. In Ritter the Alabama Supreme Court reversed, on authority of Beck, the conviction of a defendant who had pleaded guilty to the capital offense, who had in fact admitted his guilt and demanded

the death penalty. The Court wrote, in denying rehearing in Ritter:

> "We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, 639 F. 2d 221 (March 19, 1981) (Pending on certiorari in this Honorable Court), which involved Ritter's partner in this crime."

A pattern was established for all pre-Beck cases by the decision in Ritter. This Honorable Court's decision in Beck was interpreted as requiring automatic retrials.

On December 11, 1981, the Alabama Supreme Court wrote:

> "The United States Supreme Court has remanded this case to this Court for further consideration in light of Reed v. State, Ala., [MS. June 12, 1981] ___ So. 2d ___ (1981), extended on rehearing (August 28, 1981), motion for clarification denied (October 7, 1981).

> "On June 12, 1981, this Court extended its initial opinion in the present case to explain that our reversal and remand was compelled by the decision of the United States Supreme Court in Beck v. Alabama, [447] U.S. [625], 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State, Ala., 396 So. 2d 645 (1980), and was "consistent with the interpretation of that decision" reached by the Fifth Circuit in Evans v. Britton, [639] F. 2d [221] [March 19, 1981] (1981). We adopt our previous opinion and now unequivocally hold that our previous opinion in this case was based upon federal constitutional grounds, not state law grounds. Moreover, our opinion in Reed v. State, supra, rather than altering our previous decision in this case explained further why we felt compelled by federal constitutional considerations to reverse the conviction in this case." (Ritter v. State [S. Ct. Ala., Dec. 11, 1981] ___ So. 2d ___).

The issue, therefore, is whether this Honorable Court's decision in Beck mandates retrial in every case without regard to the evidence. The Petitioner

respectfully submits that automatic retrial is not so mandated.

There was no evidence at Respondent's trial to support any lesser included offense instruction. The evidence presented two choices for the jury. Either the Respondent participated in the killing of the two victims in Mobile, Alabama, or the Respondent was in Texas. Consequently, the preclusion clause had no impact on this case.

The Alabama statute, before the severance of the preclusion clause, required that juries choose between guilt of the capital offense or acquittal, even if the evidence suggested a middle verdict. Had the preclusion clause never existed, however, this case would still have presented the Respondent's jury with the same two choices. The possibility of a verdict of guilty of a

lesser included offense was precluded by the evidence. The Alabama Court of Criminal Appeals and the Supreme Court of Alabama have decided this issue in a manner in conflict with this Honorable Court's opinion in Beck. Petitioner submits that this Honorable Court did not mandate automatic reversal for cases which could not have been affected in any way by the preclusion clause. Certiorari was granted by this Honorable Court on June 22, 1981, to decide among other issues, whether the Beck decision mandates the reversal of all pre-Beck capital convictions including those for which there was no lesser included offense predicate. Hopper v. Evans, 80-1714, sub. nom. Britton v. Evans, 49 LW 3954.

## II.

REVERSING THIS CASE FOR A NEW TRIAL CREATES THE UNCONSTITUTIONAL RISK OF AN ARBITRARY AND CAPRICIOUS VERDICT. (REASON FOR GRANTING THE WRIT - CONFLICT WITH FURMAN V. GEORGIA, 408 U.S. 238 (1972) AND ROBERTS V. LOUISIANA, 428 U.S. 325 [1976])

Reversing cases like the instant case on authority of Beck creates the possibility that on retrial the jury will be permitted to consider lesser included offenses even if the evidence is a carbon copy of that presented at the first trial. This creates the possibility of arbitrary and capricious verdicts contrary to the evidence. Procedures which needlessly create such possibilities were condemned in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) and again in Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976).

In the instant case the conclusive and uncontradicted evidence was that

the crime was capital murder. The jury may well have believed Respondent's alibi and acquitted him, but they could not have convicted him under the evidence of anything other than that of a capital crime. Furthermore, Daniels has never proven, or even alleged, that his failure to present lesser offense evidence was caused by the existence of the preclusion clause. He was not prevented from presenting lesser offense evidence and putting forth the defense that he was due to be acquitted of the capital charge because he was guilty of only a lesser offense. Daniels was not, therefore, harmed or prejudiced in any way by the existence of the preclusion clause; his due process rights were not violated. Consequently, his conviction should not be set aside.

No defendant has the right to jury instructions on lesser included

offenses where there is no evidence which supports such lesser included offenses. What is given to a defendant in a capital case by the Constitution is the right to jury instructions on those lesser included offenses for which the evidence would support a verdict. Beck v. Alabama, supra; Gregg v. Georgia, 428 U.S. 153,160-163, 215-216 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976).

The language of the Court itself in Beck shows that the holding in that case was limited to those cases where there was a basis in the evidence for instructions on lesser included offenses. In addition, the precedents relied on for so limiting the Court's ruling also require that some evidentiary predicate exist before a lesser included offense jury instruction must be given. E.g., Keeble v. United States, 412 U.S. 205, 208 (1973); Berra

v. United States, 351 U.S. 131, 134 (1956).

The test used in Alabama for determining if a defendant is due jury instructions on lesser included offenses is whether "there is any reasonable theory from the evidence which would support the position." Fulghum v. State, 291 Ala. 71, 277 So. 2d 776, 890 (1973), Accord, Chavers v. State, Ala., 361 So. 2d 1106 (1978). It follows that a defendant is not entitled to jury instructions on lesser included offenses where there is no evidence to support a conviction for such an offense. E.g., Fulghum, supra, Harvest v. State, Ala. Cr. App., 342 So. 2d 1369, (1977); Golston v. State, 57 Ala. App. 623, 330 So. 2d 446 (1975)

It is this test, whether there is any reasonable theory from the evidence to support a lesser included offense

instruction, which must first be applied to the facts in the instant case before a remand for retrial is ordered. The fact that the instant case is a capital case does not make this test inapplicable as the Alabama Supreme Court in Beck v. State, Ala. 396 So. 2d 645, 657 (1981) (on remand), held that:

> "Absent the 14 words which constitute the preclusion clause, the long established Alabama statutory and common law rule will apply so that juries in capital cases will be instructed on any lesser included offenses supported by the evidence...."

Nothing in the Constitution requires that a court in a capital case charge the jury on lesser included offenses when there is no evidence to support a conviction for such an offense.

There is available an alternative procedure which avoids the risk of arbitrary and capricious verdicts while

guaranteeing the accused full protection from even any theoretical adverse effects of the preclusion clause.

The alternative to an automatic new trial is a hearing in the trial court on the issue of the effect of the preclusion clause on the original trial. There is recent precedent for such a hearing in the alternative to a new trial. In Pate v. State, Ala., ___ So. 2d ___ (May 8, 1981), the Alabama Supreme Court found that the trial court erred in not reviewing pre-trial witness statements but did not order a new trial unless it appeared that the error had affected the original trial. In Pate the cause was remanded to the trial court for such determination. Since this remandment procedure is available, it should, under the decisions of this Honorable Court, be pursued rather than the automatic granting of a new trial.

## CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason, the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama and upon such review will reverse the decisions of said Courts granting a new trial to the Respondent.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Helen P. Nelson, an Assistant Attorney General and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this 21st day of January, 1982, I did serve the requisite number of copies of the foregoing on the Attorneys for John Ronald Daniels, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

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V.

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RESPONDENT

# APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

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APPENDIX A

AUG 4 1981

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1980-81

1 Div. 92

John Ronald Daniels

v

State

Appeal from Mobile Circuit Court

PER CURIAM

The judgment of the conviction is reversed and the cause remanded for a new trial on authority of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), on remand, Ala., 396 So.2d 645 (1981), and Ritter v. State, Ala.S.C. No. 77-798 (Ms. May 8,

1981), Ala.Cr.App., 1 Div. 837 (Ms. June 23, 1981), July 7, 1981, Motion for Stay of Mandate Denied by Ala.S.C.

REVERSED AND REMANDED.

All Judges Concur.

APPENDIX B

December 11, 1981

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

Ex Parte: State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: John Ronald Daniels

81-61 v.

State of Alabama)

Petition for Writ of Certiorari denied. No opinion. PER CURIAM - ALL THE JUSTICES CONCUR, EXCEPT ADAMS, J., NOT SITTING.

# APPENDIX C

# CODE OF ALABAMA,

# 1975,

# TITLE 13,

# CHAPTER 11

## DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE

### § 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony, or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the

trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1).

§ 13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of,or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are in-

tentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in

the twenty years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an

offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2).

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In

the hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3).

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court,after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing,as the basis for the sentence of death, findings of fact from the trial and the sentence hearing,which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death, and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4).

§ 13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5).

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6).

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disburbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7).

§ 13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this act who is not able to afford legal coun-

sel must be provided with court appointed counsel having no less than five years prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8).

§ 13-11-9. Effective date.

This article shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10).

## CERTIFICATE OF SERVICE

I, Helen P. Nelson, an Assistant Attorney General and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this 21st day of January, 1982, I did serve the requisite number of copies of the foregoing on the Attorneys for John Ronald Daniels, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Honorable Thomas M. Haas
255 St. Francis Street
Mobile, Alabama 36602

Honorable James M. Byrd
255 St. Francis Street
Mobile, Alabama 36602

Helen P. Nelson
HELEN P. NELSON
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

NUMBER 81-1397

SUPREME COURT
UNITED STATES OF AMERICA

OCTOBER TERM, 1981

STATE OF ALABAMA,
Petitioner,

VS.

JOHN RONALD DANIELS,
Respondent.

# BRIEF IN OPPOSITION TO CERTIORARI

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## QUESTIONS PRESENTED

I. WHETHER NEW TRIALS ARE MANDATED IN ALL ALABAMA CAPITAL CASES BY Beck v. Alabama, 447 U.S. 625 (1980) AND Beck v. State, 396 So.d 645 (Alabama 1981).

II WHETHER THE EVIDENCE IN THIS CASE WOULD SUPPORT INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

## TABLE OF AUTHORITIES


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Keller v. State, 380 So.2d 926 (Ala. Cr. App. 1979), cert. denied, 380 So.2d 938 (1980). 9

Reed v. State, 407 So.2d 162 (Ala. 1981). 6,7

## STATEMENT OF THE CASE

Respondent adopts as substantially correct the Statement of the Case contained in the Brief for Petitioner, but would add the following to the State's summary of the facts:

The credibility of Melvin Turberville, who testified about a conversation with Respondent in the Mobile County Jail, came under sharp attack from the defense (R 308, 311-12, 323-26), and Turberville admitted to a prior inconsistent statement in which he said that John Ronald Daniels never told him he killed anyone. (R. 318-20)

## SUMMARY OF ARGUMENT

I. NEW TRIALS ARE MANDATED IN ALL ALABAMA CAPITAL CASES BY Beck v. Alabama, 447 U.S. 625 (1980) AND Beck v. State, 396 So.2d 645 (Ala. 1981).

The unconstitutional choice between death and complete freedom renders the factfinding process so defective that a post-trial review cannot correct the error. The accuracy demanded in a decision to take a life can only be achieved by a fair trial. The bifurcated proceeding required by the Alabama Supreme Court makes a new trial even more nesessary.

II. THE EVIDENCE IN THIS CASE WOULD SUPPORT INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

Respondent's participation in the crime charged does not necessarily amount to capital murder. Not every accomplice to a capital crime can be found guilty of capital murder under Alabama law. Moreover, the evidence leaves a jury question as to whether Respondent was an accomplice in both intentional killings.

I. NEW TRIALS ARE MANDATED IN ALL ALABAMA CAPITAL CASES BY Beck v. Alabama, 447 U.S. 625 (1980) AND Beck v. State, 396 So.2d 645 (Ala. 1981).

In Beck v. Alabama, this Court decided that the death penalty may not be imposed where a jury could not consider lesser included offenses which were supported by the evidence. 447 U.S. 625, 627 (1980). After remand, the Alabama Supreme Court decided that in light of this Court's decision, the Alabama statute required a bifurcated proceeding to insure that the jury would not use its power to decide guilt to make a de facto punishment decision. Beck v. State, 396 So.2d 645, 659-63 (Ala. (1981). Subsequently, retrials were mandated for all Alabama capital cases. Reed v. State, 407 So.2d 162 (Ala. 1981).

The Alabama Supreme Court's interpretation of Beck v. Alabama is correct, because no ex post facto examination of a record can liberate a trial from the terrible effects of the Hobson's choice between death and complete freedom for a defendant. All of a defendant's decisions on the preparation and conduct of his trial had to be weighed in light of the heavy burden of this unconstitutional choice. The punishment for a capital crime is too severe and too final to be imposed on the basis of speculation about what a defendant would or would not be able to achieve if he were given a fair trial. Evans v. Britton, 628 F.2d 400, 401 (1980), rehearing denied, 639 F.2d 221 (5th Cir. 1981), cert. granted No. 80-1714. The decision to take a person's life is one that should be made only with highest possible degree of accuracy. That accuracy cannot be achieved in a post-trial hearing, Beck v. Alabama at 645-46, but only in a new trial.

A new trial is given even more importance by the Alabama Supreme Court's decision that henceforth the jury's factfinding and

sentencing functions will be bifurcated. This procedure was required by the role in sentencing given to the jury under the Alabama Statute. Beck v. State at 659-60. The separation of the jury's two functions will work significant changes in both the content and emphasis of the factfinding process. See Beck v. Alabama at 643 n.19. The requirement of a bifurcated proceeding and its consequent effects make a new trial a necessity. Reed v. State, 407 So.2d 162, 163 (Ala. 1981).

II. THE EVIDENCE IN THIS CASE WOULD SUPPORT INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

The Alabama rule on whether charges on lesser included offenses should be given was stated in Chavers v. State, 361 So.2d 1106, 1107 (Ala. 1978):

> ... our decisions are to the effect that every accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however weak, insufficient, or doubtful in credibility.

The evidence shows that on January 2, 1977, two people were shot to death on Interstate 10 in Mobile County. (R.286-87, 380) Respondent was charged with "Murder in the First Degree wherein two or more human beings are intentionally killed by the Defendant by one or a series of acts." Section 13-11-2 (a) (10) of the Code of Alabama (1975). The State's theory was that Respondent and his Co-Defendant, Philip Wayne Tomlin, both participated in the killings. (Br. for Petitioner 3-4,6) There was no evidence presented as to who fired the fatal shots, or under what circumstances the shots were fired. The defense was alibi. (R. 685-87)

The State argues in its brief that the only two choices for the jury were a verdict of guilty of capital murder or a verdict of not guilty. "Either the Respondent participated in the killings of the two victims in Mobile, Alabama, or the Respondent was in Texas." (Br. for Petitioner 15) But if the jury believed the Respondent participated, that does not lead ineluctably to the conclusion that his participation amounted to capital murder.

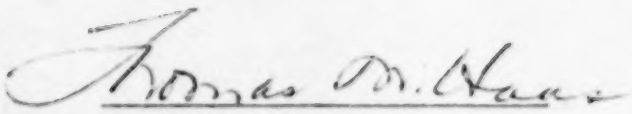
Alabama recognizes that an accomplice to a capital crime may be convicted of capital murder. Ritter v. State, 375

So.2d 270, 274-75 (Ala. 1979). The Supreme Court of Alabama found that "Ritter stands at the most culpable end of the spectrum of accomplice liability," but stated that the death penalty would not be permissible for all accomplices to capital crimes. 375 So.2d at 275; see also Beck v. Alabama, 447 U.S. 625, 628 n.2 (1980). Since there is no direct evidence of the degree or character of this Respondent's participation, his position along the spectrum of accomplice liability is something a jury must decide.

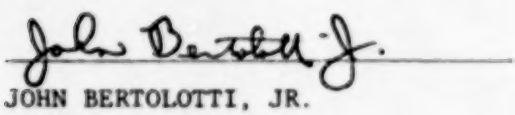
Furthermore, the State has the burden proving, under Section 13-11-2 (a) (10), that the Respondent was an accomplice to the intentional killing of both victims. If it could be shown that Respondent was an accomplice to one of the killings, it would still be necessary to prove that he also had a specific intent with respect to the other victim. In Alabama, an accomplice to murder must have "a previous understanding to kill or injure the deceased, or ... a knowledge of the intent to kill on the part of the co-defendant." Keller v. State, 380 So.2d 926, 934 (Ala. Cr. App. 1979), cert. denied, 380 So.2d 938 (1980). The inference to be drawn from the evidence as to Respondent's intent can only be drawn by a properly instructed jury.

## CONCLUSION

Respondent respectfully asks this Court to deny certiorari in this case.



THOMAS M. HAAS



JOHN BERTOLOTTI, JR.

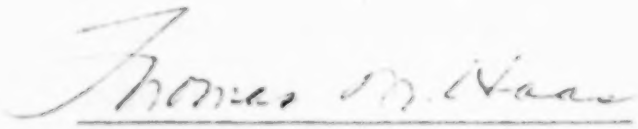
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Thomas M. Haas, a member of the Bar of the United States Supreme Court, do hereby certify that I have this day served a copy of the foregoing brief on the Attorney General of the State of Alabama, by placing a copy of the same in the United States mail, postage prepaid and addressed as follows:

Honorable Charles Graddick
Attorney General of Alabama
64 North Union Street
Montgomery, Alabama 36130

April 9, 1982.



THOMAS M. HAAS

## CERTIFICATE OF MAILING

I, Thomas M. Haas, a member of the Bar of the United States Supreme Court, hereby certify that the foregoing notice, motion and brief in Case No. 81-1397 were mailed to the Clerk of the Supreme Court of the United States by placing them in the mail at the United States Post Office at Congress and Saint Joseph Streets in Mobile, Alabama during regular business hours on April 9, 1982.

Thomas M. Haas

THOMAS M. HAAS

Sworn and subscribed before me this 9th day of April, 1982.

Glenda Thompson

GLENDA THOMPSON
Notary Public
My Commission expires: 1/24/84

RECEIVED
APR 12 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NUMBER 81-1397

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Respondent moves for leave to file his brief in opposition to certiorari under the provisions of rules 46 and 39, and as grounds assigns the following:

1. Respondent is presently incarcerated in the Alabama State Penitentiary, and has been continuously in custody since early in 1977.

2. Respondent was represented by his retained Attorney, Thomas M. Haas, in the trial court and in the Appellate courts of Alabama. Respondent has not been able to pay his Attorney for the proceedings in this Court, and cannot afford the costs of printing and binding briefs.

3. Respondent has executed a Pauperis affidavit which is being mailed under separate cover from Holman Prison, Alabama.

WHEREFOR, Respondent moves this Court to allow him to proceed In Forma Pauperis.

Thomas M. Haas

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NUMBER 81-1397

SUPREME COURT
UNITED STATES OF AMERICA

OCTOBER TERM, 1981

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF ALABAMA
Petitioner,

VS.

JOHN RONALD DANIELS,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, John Ronald Daniels, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. LAST EMP. 12-20-76 $2,000 MO.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes,state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

John Ronald Daniels

JOHN RONALD DANIELS

CERTIFICATE OF SERVICE

I, Thomas M. Haas, a member of the Bar of the United States Supreme Court, do hereby certify that I have this day served a copy of the foregoing notice and motion on the Attorney General of the State of Alabama, by placing a copy of the same in the United States mail, postage prepaid and addressed as follows:

Honorable Charles Graddick
Attorney General of Alabama
64 North Union Street
Montgomery, Alabama 36130

April 9, 1982.

Thomas M. Haas

THOMAS M. HAAS